LIBRARY
SUPREME COURT, U. S.

Office - Supreme Court, U. S.
FILED
FEB 23 1951

Nos. 65, 146, 208.

In the Supreme Court of the United States

October Term, 1950.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 501, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., ET AL.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and District of Columbia Circuits.

BRIEF OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., AMICI CURIAE.

[illegible]
Attorneys for Amici Curiae.

INDEX.

PAGE

Opinions below 2

Jurisdiction 3

Questions presented 3

Argument 4

I. The unfair labor practices found do not affect commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act 4

A. An unfair labor practice under Section 8 (b) (4) (A) of the Act cannot affect commerce if the secondary employer has no "inflow" or "outflow" of goods across state lines 7

B. Since the light construction industry neither sells its product nor buys its materials in an interstate market, small local strikes in that industry, in the absence of special circumstances, do not affect commerce within the meaning of Section 2 (6) and (7) of the Act 9

II. Section 8 (b) (4) (A) of the Act does not make it an unfair labor practice for a union to induce or encourage employees to cease working on, or making deliveries to, a building project where nonunion labor is being employed by one subcontractor 15

A. Section 8 (b) (4) (A) makes an unfair labor practice only such strikes and picketing as are secondary boycotts at common law 16

B. Striking or picketing a construction project because of the presence of nonunion employees working for one subcontractor is not a secondary boycott at common law 19

III. Section 8 (c) precludes the Board from finding as an unfair labor practice under Section 8 (b) (4) (A), picketing which the Board finds is merely an expression of views, argument and opinion without threat 23

A. Section 8 (c) is applicable to Section 8 (b) (4) (A) 24

B. The Board's determination that the picketing in question was merely the expression of views, argument or opinion without threat was a finding of fact which it cannot attack 27

C. Section 8 (c) affords a broader protection for free speech than that provided by the First Amendment to the Constitution of the United States 28

D. The picketing in question was constitutionally protected .. 34

Conclusion 35

CITATIONS.

Cases:	PAGE
American Federation v. Swing, 321 U. S. 321	34
Automobile Workers v. O'Brien, 339 U. S. 454	8
Bakery Drivers v. Wohl, 315 U. S. 767	34
Browing v. City of Waycross, 233 U. S. 16	10, 14
Building Service Employees v. Gazzam, 339 U. S. 532	33
Cafeteria Employees v. Angelos, 320 U. S. 293	34
Carpenters Union v. Ritter, 315 U. S. 722	29
City of Yonkers v. United States, 320 U. S. 685	27
Cohn & Rath Electric Co. v. Bricklayers', Masons' & Plasterers' Local Union No. 1, 92 Conn. 161, 101 Atl. 659, 6 ALR 887	19
Denver Building & Construction Trades Council and Henry Shore, 90 NLRB, No. 224, decided August 7, 1950	26, 28, 32
Denver Building Trades Council, 90 NLRB No. 66	14
Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672	19
Eastern-Central Motor Carriers Association v. United States, 321 U. S. 194	27
B. W. Fellers Co., 88 NLRB, No. 212	14
Giboney v. Empire Storage & Ice Co., 336 U. S. 499	29, 32
Glaziers Union, 90 NLRB, No. 93	14
Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Ann. St. Rep. 477, 1 Ann. Cas. 172	19
Hughes v. Superior Court, 339 U. S. 460	33
International Brotherhood of Teamsters v. Hanke, 339 U. S. 470	33
International Rice Milling Co. v. National Labor Relations Board, 183 F. 2d 21, certiorari granted, 340 U. S. 902	15
Kingston Trap Rock Co. v. International Union of Operating Engineers, 129 N. J. Eq. 570, 19 A. 2d 661	19
Mandeville Island Farms v. American Crystal Sugar Co., 334 U. S. 219	9
Meier v. Speer, 96 Ark. 618, 132 S. W. 988, 32 L. R. A. n. s. 792	19
Walter J. Mentzer, 82 NLRB 389	14
Merrill Construction Co., Inc., 92 NLRB, No. 26	14
Mills v. United Association of Journeymen & Apprentices of the Plumbing and Pipe Fitting Industry, 83 F. Supp. 240	19, 28
National Labor Relations Board v. Fainblatt, 306 U. S. 601	10
National Labor Relations Board v. Federbush Co., 121 F. 2d 954	29
National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1	8
National Labor Relations Board v. May Department Stores Co., 146 F. 2d 66, modified in part, 326 U. S. 376	10
National Labor Relations Board v. Virginia Electric and Power Co., 314 U. S. 469	29
Potredis & Fryer, 85 NLRB 241	14
Row Construction Co., 88 NLRB, No. 132	14
Securities & Exchange Commission v. Chenery Corp., 318 U. S. 80	27
Thomas v. Collins, 323 U. S. 516	32
Thornhill v. Alabama, 310 U. S. 88	34
United States v. Carolina Freight Carriers Corp. 315 U. S. 475	28

PAGE

United States v. Real Estate Boards, 339 U. S. 485 10
United States v. San Francisco Electrical Contractors Association, 57 F. Supp. 57 10

Wadsworth Building Co., 81 NLRB 802 24
Wickard v. Filburn, 317 U. S. 111 9

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. III, 151, et seq.) .....
Section 2 (6) 3, 4, 7, 9
Section 2 (7) 3, 4, 7, 9
Section 8 (a) (1) 25
Section 8 (a) (2) 25
Section 8 (b) (4) 3
Section 8 (b) (4) (A) 3, 4, 5, 7, 8, 15, 16, 24
Section 8 (c) 3, 24, 26, 28
Section 10 (a) 7

Miscellaneous:

American Jurisprudence, Property, §18, p. 199 10
American Jurisprudence, Vol. 31, Labor, §§264-265 19
American Law Institute, Restatement of the Law of Torts, Vol. 4, §§780, 798, 799, 805, pp. 93, 101-102, 138-139 .....19, 20, 21, 33

Colean, Miles L., Your Building Code (National Committee on Housing, Inc., 1946), p. 16 12
93 Cong. Rec. 3834, 3838, 4020, 4198, 4835-4838, 4893, 6443-6444, 6859, A-1222, A-3370 .....8, 18, 25, 26, 31, 32

Grebler, Leo, Production of New Housing: A Research Monograph on Efficiency (N. Y. Social Science Research Council, 1950), pp. 3, 6-7, 9-10, 15-16, 35-36, 39, 54, 90 10

Haber, William, Industrial Relations in the Building Industry (Harvard, 1930), p. 329 .....13, 22
Hayes, Warren B., A Study of the Distribution of Building Materials (Harvard School of Business Administration, 1950), pp. 7, 8, 25-26, 30, 34, 45 11
Hearings on Bills to Amend and Repeal the National Labor Relations Act, Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., pp. 63, 254, 255-256, 568, 1838-1839 .....16, 17, 18
Hearings, House Committee on Education and Labor, 80th Cong., 1st Sess., on H. R. 8, p. 50 30
Hearings, House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 25-28, 2722-2723 31
H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45 .....25, 32
H. Doc. No. 657, 80th Cong., 2nd Sess., High Cost of Housing (Gov't. Print. Off., 1948), pp. 139-140 12
H. R. 9195, 76th Cong., 3d Sess., Sec. 7 30
H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 4-5, 6, 23, 33 .....8, 25, 31
H. Rep. No. 1902, 76th Cong., 3d Sess., pp. 83, 90-91, 104-105 30
H. Rep. No. 3109, 76th Cong., 3d Sess., pp. 82-83, 90-91, 159 30

Keim, Walter G., Geographical Differentials in Prices of Building Materials, 76th Cong., 3rd Sess., TNEC Monograph No. 33 (Gov't. Print. Off., 1940), pp. 123, 379 12

Millis, Harry A., Organized Labor (1945), Volume 3, pp. 376-377 .. 13

Restatement, Law of Torts (American Law Institute), Vol. 4, pp. 93, 101-102, 138-139, §§780, 799, 799 (d), Comment (e), §805, Comment (a), Illustrations 1, 2 ..... 19, 22

S. Rep. No. 105, 80th Cong., 1st Sess., pp. 23-24 25

Stone, Peter A., Toward More Housing, 76th Cong., 3d Sess., TNEC Monograph No. 8 (Gov't. Print. Off., 1940), pp. 35, 38, 39, 57, 59, 60, 61, 63, 64, 66, 128, 129, 138, 140, 182-183, 184 11

Twentieth Century Fund, American Housing (1944), pp. 89, 398-399. 10

United States Bureau of Labor Statistics, Bull. No. 626, Peterson, Florence, Union Scales in Wages and Hours in the Building Trades (Gov't. Print. Off., 1937), pp. 26-46 13

Bulletin No. 730, same title (Gov't. Print. Off., 1942), pp. 28-66 .. 13

Bulletin No. 815, same title (Gov't. Print. Off., 1944), pp. 25-60 .. 13

United States Bureau of Labor Statistics, Bull. No. 680, Union Wages, Hours & Working Conditions in the Building Trades, June 1, 1941 (Gov't. Print. Off., 1942), pp. 33-34 13

United States Bureau of Labor Statistics, Bull. No. 694, Handbook of Labor Statistics, 1941 ed., Vol. 1, pp. 329-342 13

United States Bureau of Labor Statistics, Bull. No. 940, Occupational Outlook Handbook (Gov't. Print. Off., 1948), p. 177 13

In the Supreme Court of the United States

October Term, 1950.

Nos. 85, 108, 393.

LOCAL 74, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, A. F. OF L., AND JACK HENDERSON, Individually and as Agent for Local 74, United Brotherhood of Carpenters and Joiners of America, A. F. of L., *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

DENVER BUILDING AND CONSTRUCTION TRADES COUNCIL; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A. F. OF L., LOCAL 68; AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A. F. OF L., LOCAL NO. 3.

On Writs of Certiorari to the United States Courts of Appeals for the Second, Sixth and District of Columbia Circuits.

BRIEF OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., AND WALTER A. SAID, AS AGENT FOR UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, DISTRICT COUNCIL OF KANSAS CITY, MISSOURI, AND VICINITY, A. F. OF L., AS *AMICI CURIAE*.

United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vicinity, A. F. of L., and Walter A. Said, as agent for

United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vicinity, A. F. of L., have filed a petition for a writ of certiorari (No. 387, this Term) seeking review by this Court of a decree of the United States Court of Appeals for the Tenth Circuit (184 F. 2d 60) enforcing an order of the National Labor Relations Board issued against them (81 NLRB 802). A number of the questions presented by the petition for a writ of certiorari in No. 387, this Term, involve issues also presented in the instant cases. Since this Court has not yet acted upon the petition for a writ of certiorari in No. 387, this Term, but has set the instant cases for oral argument at an early date, the petitioners in No. 387, this Term, desire to safeguard against this Court deciding certain issues which might establish legal precedents contrary to their position without having before the Court their position. The petitioners in No. 387, this Term, have therefore requested and secured from counsel for each of the parties in the instant cases, consent to the filing by petitioners in No. 387, this Term, of a brief as *amici curiae* herein. The letters granting such consent have been filed with the clerk of this Court.

Opinions Below.

The opinion of the United States Court of Appeals for the Sixth Circuit in No. 85, this Term (R. 186-196), is reported in 181 F. 2d 126. The decision and order of the Board in that case (R. 51-61) are reported in 80 NLRB 533.

The opinion of the United States Court of Appeals for the Second Circuit in No. 108, this Term (R. 323), is reported in 181 F. 2d 34. The decision and order of the Board in that case (R. 295-300) are reported in 82 NLRB 1028.

The opinion of the United States Court of Appeals for the District of Columbia Circuit in No. 393, this Term (R. 265-281), is not yet officially reported. The decision and order of the Board in that case (R. 256-263, 211-247) are reported in 82 NLRB 1195.

Jurisdiction.

The petitions for writs of certiorari in Nos. 85, 108, and 393, this Term, were granted December 11, 1950 (340 U. S. 902).

Questions Presented.

This brief *amici curiae* will be limited to the following questions which are also presented by the petition in No. 387, this Term:

1. The question presented by all three cases of whether the alleged unfair labor practice under Section 8 (b) (4) (A) of the National Labor Relations Act, affects commerce within the meaning of Section 2 (6) and (7) of the Act, when the employer, whose employees on one small building job are allegedly induced to cease work, is not importing any goods from out of the state for use on that job.

2. The question presented by all three cases of whether Section 8 (b) (4) (A) of the Act makes it an unfair labor practice for a union to induce or encourage employees to cease working on, or making deliveries to, a building project where nonunion labor is being employed by one subcontractor.

3. The question presented by No. 108, this Term, of whether picketing, which constitutes merely the expression of views, argument or opinion and neither expressly nor impliedly threatens, is protected by Section 8 (c) of the Act or the First Amendment to the Constitution of the United States.

ARGUMENT.

I.

The unfair labor practices found do not affect commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act.

The three instant cases (Nos. 85, 108, and 393, this Term) and the case in which *amici curiae* are petitioners (No. 387, this Term) each present the question of whether violation of Section 8 (b) (4) (A) of the National Labor Relations Act by inducing or encouraging employees of an employer engaged on a small building job to cease work affects commerce within the meaning of Section 2 (6) and (7) of the Act where that employer is not importing any goods from out of the state for use on the job. Three of the cases (Nos. 85, 108, and 387, this Term) involve small private residences: No. 85, the remodeling of a home; No. 108, the building of a home by conventional methods; No. 387, the erection of a "prefabricated" house. One case (No. 393, this Term) involves the erection of a small commercial building. In each case the alleged secondary employer, that is, the employer whose employees the Board found had been induced and encouraged in violation of Section 8 (b) (4) (A), did not import any goods directly from out-of-state sources:

In No. 85, the only employees who were induced to quit in alleged violation of Section 8 (b) (4) (A) were the carpenters. The Board deemed it unnecessary to determine whether the carpenters were employees of Stanley, the owner of the house, or Parker, the general contractor (80 NLRB, at 536, n. 9). Both Stanley and Parker were engaged in a purely local construction project and neither

imported any materials from across state lines (80 NLRB 533, 534-535, 544-545).

In No. 108, the Board found that the only employees who were induced to quit in alleged violation of Section 8 (b) (4) (A) were carpenters employed by Deltorto, the carpentry subcontractor (82 NLRB, at 1029, 1040-1041). The Board also found that Deltorto was engaged in a local carpentry business in Connecticut, the same state in which the house in question was being erected, and that he bought his lumber from a Connecticut dealer from local stocks which the lumber dealer had sometime prior to Deltorto's purchase imported from other states (82 NLRB, at 1034).

In No. 387, the Board found that the alleged secondary employer, Klassen, the erector-dealer of the "prefabricated" house, was engaged in a purely local construction business in the same state in which the "prefabricated" house was manufactured and had no "inflow" of materials across state lines (81 NLRB, at 802, 832).

In No. 393, there was no finding that the alleged secondary employers, Doose & Lintner, the general contractor, or any of the subcontractors whose employees were induced or encouraged to quit work allegedly in violation of Section 8 (b) (4) (A), had any "inflow," either direct or indirect, of materials across state lines (82 NLRB, at 1196, 1202-1204, 1208-1210).

In all four cases the Board assumed that the primary employer purchased varying quantities of materials originating in other states:

In No. 85, the Board found that the primary employer, Watson, was installing imitation tile obtained by it from a stock in the state, which had, however, at some previous time been imported from out of the state (80 NLRB, at 534, 542-543).

In No. 108, the primary employer, Langer, the electrical subcontractor, brought the electrical materials he was installing into Connecticut from his place of business in New York (82 NLRB, at 1035-1036).

In No. 387, the primary employer, Wadsworth, the manufacturer of prefabricated houses, obtained about one-half of his materials used either in constructing his plant or producing houses from out-of-state sources (81 NLRB, at 832).

In No. 393, the primary employer, Gould & Preisner, the electrical subcontractor, obtained the electrical supplies they used on the project in question from a stock which they maintained in the state, of which 65 per cent had at some previous time been imported from out of the state. There was no evidence that any of the supplies they were using on the project in question had in fact ever crossed state lines (82 NLRB, at 1202-1204).

The Board in each case based its finding that the unfair labor practice affected commerce upon two theories: (a) since the activities of the primary employer affected commerce, inducing the employees of a purely local employer to cease work in order to influence the conduct of the primary employer also affected commerce (No. 85, 80 NLRB, at 534-535; No. 108, 82 NLRB, at 1029; No. 387, 81 NLRB, at 803; No. 393, 82 NLRB, at 1196); and (b) although the business of one small building contractor does not itself affect commerce, he is representative of many others throughout the country whose aggregate businesses substantially affect interstate commerce in a way which can not be regulated unless each small contractor is regulated (No. 85, 80 NLRB, at 535; No. 108, 82 NLRB, at 1029, 1037-1038; No. 387, 81 NLRB, at 804; No. 393, 82 NLRB, at 1196). The courts of appeals in these cases upheld both of the Board's theories (No. 85, 181 F. 2d, at 129-131;

No. 108, 181 F. 2d, at 36-37; No. 387, 184 F. 2d, at 62; No. 393, R. 267).

Each of the Board's theories of jurisdiction is, we believe, demonstrably erroneous.

A. An Unfair Labor Practice Under Section 8 (b) (4) (A) of the Act cannot affect commerce if the secondary employer has no "inflow" or "outflow" of goods across state lines.

The Board's first theory of jurisdiction in these cases, that the effect on commerce may be measured by the primary employer's relationship to interstate commerce, ignores the statutory basis of jurisdiction. The Act does not confer jurisdiction on the Board wherever any of the parties have some relationship to interstate commerce. Nor does it confer jurisdiction on the Board wherever there is a labor dispute which has economic repercussions on interstate commerce. Rather, the Board is limited to the exercise of jurisdiction where the unfair labor practice found itself has led or tends to lead to a stoppage of the flow of goods in interstate commerce. Sections 2 (6) and (7) and 10 (a) of the Act.

Where, as the Board either found or assumed in each of these cases, the union's conduct in picketing or striking against the primary employer was a fair labor practice (No. 85, 80 NLRB, at 539, 546-547; No. 108, 82 NLRB, at 1028, n. 2, 1039-1040; No. 387, 81 NLRB, at 843; No. 393, 82 NLRB, at 1205, 1218), the stoppage of the flow of goods to and from the primary employer's business is a fair labor practice. Whatever the effect on commerce may be of the union's interference with the flow of goods to and from the primary employer, it is caused by a fair, rather than an unfair, labor practice. In other words, it is caused by a stoppage which Congress deliberately protected because in the long run the effects of such a stoppage were deemed more beneficial than detrimental. Con-

gress proceeded on the assumption that where the stoppage of the flow of commerce of the primary employer was caused by efforts of the union to organize or to achieve higher wages, as was true in the instant cases, the stability of relationship and the increased purchasing power which would ensue should the union achieve its objectives would so protect and increase the flow of commerce as to offset the ill effects of any momentary interruptions. Such interruptions of interstate commerce are to be contrasted with interruptions caused or threatened because of employer interference with union activities or refusals to bargain collectively. Interruptions in the flow of goods across state lines caused by employer unfair labor practices hold no promise of future stability or increased purchasing power but just the reverse.[1]

The legislative history of Sections 8 (b) (4) (A) shows that Congress intended thereby to protect the flow of goods in interstate commerce, to and from "innocent" or "unconcerned" third parties from stoppages due to unions inducing their employees to engage in sympathy strikes and secondary boycotts (H. Rep. 245 on H. R. 3020, 80th Cong., 1st Sess., pp. 4-5, 23; 93 Cong. Rec. 3834, 4198). Congress did not want a whole chain of interstate businesses to be stopped as the result of a dispute in which they were not involved, but instead wanted to limit the effect of strikes to a stoppage of the inflow and outflow of the business enterprise concerned in the dispute (93 Cong. Rec. 4198, 4835-4838, A-1222).

From the foregoing it follows that in cases such as these where the union's efforts to stop the flow of goods to and from the primary employer is a fair labor practice, the effect on commerce of violations of Section 8 (b) (4)

[1] Cf. *Automobile Workers* v. *O'Brien*, 339 U. S. 454, 456-457, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42.

(A) must be judged solely by the inflow or outflow of goods in interstate commerce to and from the employer whose employees are wrongfully induced or encouraged to cease work. If, as is true in the instant case, the alleged secondary employer is neither engaged in importing or exporting goods across state lines in connection with the project on which his employees are induced to quit, the unfair labor practice of inducing his employees to quit neither causes nor tends to cause a stoppage of the flow of goods in interstate commerce. The Board, therefore, lacked jurisdiction of these cases.

B. Since the light construction industry neither sells its product nor buys its materials in an interstate market, small local strikes in that industry, in the absence of special circumstances, do not affect commerce within the meaning of Section 2 (6) and (7) of the Act.

The Board's second theory of jurisdiction in these cases assumes that the light construction industry, like all other industries whose interstate characteristics have been examined by the courts in determining the applicability of the National Labor Relations Act, operates in an interstate market. The fact is, however, as has been shown by repeated congressional investigations, reports of various governmental agencies and studies by economists, that the light construction industry is unique in its local characteristics. Every interstate aspect heretofore relied upon by this Court in upholding federal jurisdiction is lacking in the industry of constructing private homes and small commercial buildings.

Unlike agriculture (*Wickard* v. *Filburn*, 317 U. S. 111; *Mandeville Island Farms* v. *American Crystal Sugar Company*, 334 U. S. 219) and mining, its product is not sold in interstate commerce. The product both in its unfinished

and in its finished state constitutes real estate.[2] The finished building has fixity of site, connections with sidewalks, streets, sewer, water pipe, bulk and weight, which makes its market purely local.[3] This Court pointed out in *Browning* v. *Waycross*, 233 U. S. 16, 22, that a completed house by its very nature "could not have been the subject of interstate commerce." In dismissing an indictment for fixing the price of electrical systems on the ground that it did not show any restraint of interstate commerce, the court in *United States* v. *San Francisco Electrical Contractors Ass'n*, 57 F. Supp. 57, 65-66, n. 3 (N. D. Calif., S. D.), said:

> Here there is the construction of a system, which in its very making became a part of a building to which it was attached. By the law of fixtures, it became a part of the land on which the building stood. Certainly the "system" could not be the object of interstate commerce, for it was never in it. It came into being locally in the state, and never had a detached existence, rendering it capable of *being traded in interstate commerce.* (Emphasis in original.)

This Court has recently had occasion to note that the business of selling real estate was purely local and did not involve interstate commerce. *United States* v. *Real Estate Boards*, 339 U. S. 485, 488.

Unlike the manufacturing enterprises (*National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601) and large department stores (*National Labor Relations Board* v. *May Department Stores*, 146 F. 2d 66 (C. A. 8), modified

---

[2] This fact is recognized by both lawyers and economists: "The general principle of law is * * * that prima facie a house is real estate." American Jurisprudence, *Property*, §18, p. 199; "Houses represent a subcategory of real estate and their production is influenced by this fact." Grebler, Leo, *Production of New Housing: A Research Monograph on Efficiency* (N. Y. Social Science Research Council, 1950), p. 3.

[3] Grebler, *op. cit.*, pp. 9-10, 15-16, 36, 54; Twentieth Century Fund, *American Housing* (1944), pp. 38-39, 44.

in part, 326 U. S. 376) over which the Board's jurisdiction has been sustained because of the inflow of goods from across state lines, the light construction industry does not import its raw materials from out-of-the-state. The contractor who builds, remodels and repairs houses and small commercial buildings purchases the materials he uses on a day-to-day basis from local hardware and retail lumber dealers, of whom there are some seventy-three thousand scattered among the forty-eight states.[4] The items purchased "are materials which must go through further manufacture before they are usable in the form of a completed house. In no other comparable industry do we distribute the material necessary for production through retail channels."[5]

The retail distribution of the raw materials used in the light construction industry reflects in large measure the intrastate source of most of the materials used. The astonishingly great use of local materials in the light construction industry is due to the following factors: almost every state has sufficient raw materials to meet its own light construction industry demands. Most of the materials are bulky and expensive to ship. Due to building codes, local traditions, and climate variations, each locality has its own peculiar set of materials which cannot be used in most other communities. Lumber accounts for practically one-half of the cost of materials used in light construction. Every state has timber stands. Small sawmills being more economical than large ones, cutting and planing are done locally.[6] Every state has clay deposits and manufactures

---

[4]Stone, Peter A., *Toward More Housing*, 76th Cong., 3rd Sess., TNEC Monograph No. 8 (Gov't. Print. Off., 1940), pp. 35, 38, 59, 66, 128, 184; Hayes, Warren B., *A Study of the Distribution of Building Materials* (Harvard School of Business Administration, 1950), pp. 8, 34.

[5]Stone, *op. cit.*, p. 184.

[6]Hayes, *op. cit.*, pp. 25-26; Stone, *op. cit.*, p. 64.

its own brick and clay products.[7] Every state has its own sand, gravel and stone, the ingredients of cement.[8] More than a thousand companies scattered through forty states produce paint and varnish.[9]

"Building codes control the type of materials used * * *. Many of the features of local building codes having to do with materials * * * have been influenced by one after another particular building material * * * interest."[10] "Legislative bodies, both state and local, assist in many of these restraints * * * by prohibiting use of out-of-state materials."[11] This localism has produced a complete lack of standardization which in turn perpetuates the localism of the industry.[12] "More than 1,000 varieties of lavatory and sink traps and 19,000 kinds of valves and fittings complicate plumbing. There are 150 strengths of window glass."[13] There are 1,200 sizes of slate roofing.[14] Many building materials do not compete with out-of-state products and their prices vary from town to town solely on the basis of the local situation.[15] No figures are available as to the quantity of raw material which is used by the light construction industry.[16]

The light construction industry is composed of a continually fluctuating and indeterminant number of small contractors.[17] The "same contractor moves from houses

[7]Keim, Walter G., *Geographical Differentials in Prices of Building Materials*, 76th Cong., 3rd Sess., TNEC Monograph No. 33 (Gov't. Print. Off., 1940), p. 379; Stone, *op. cit.*, p. 63.

[8]Keim, *op. cit.*, p. 409.

[9]Keim, *op. cit.*, p. 123.

[10]Stone, *op. cit.*, p. 39; Colean, Miles L., *Your Building Code* (National Committee on Housing, Inc., 1946), p. 16.

[11]Stone, *op. cit.*, p. 140.

[12]Hayes, *op. cit.*, p. 45.

[13]H. Doc. No. 647, 80th Cong., 2d Sess., *High Cost of Housing* (Gov't. Print. Off., 1948), pp. 139-140. See also Grebler, *op. cit.*, p. 39; Stone, *op. cit.*, p. 61.

[14]Stone, *op. cit.*, p. 138.

[15]Stone, *op. cit.*, pp. 60-64.

[16]Twentieth Century Fund, *op. cit.*, pp. 398-399.

[17]Grebler, *op. cit.*, pp. 6-7, 35-36, 90; Hayes, *op. cit.*, p. 30.

to farm buildings to small stores to remodelling and repairing.'"[18] "Houses are built almost entirely by local enterprises which operate only in their own city or its suburbs."[19] Builders are limited to their own community by the difficulty of familiarizing themselves not only with local market prospects but also local regulations and their interpretation by administrative officials. "Variations in these regulations mean that the builder cannot easily transfer his pattern of land development, design and layout, or use of materials and operational methods, from one place to another."[20] Very few builders are even members of any national association.[21]

The labor used in the light construction industry is usually recruited from the neighborhood.[22] No direct count of the number employed is possible, the Bureau of Labor Statistics making its estimates on the basis of the most indirect evidence.[23] Wage rates vary in erratic fashion from city to city.[24] Labor practices and methods show similar wide diversity.[25] Collective bargaining contracts pertain only to a given locality.[26] Strikes are usually limited to one project, and never extend beyond the city and immediate vicinity.[27]

---

[18] Hayes, *op. cit.*, p. 7.
[19] Stone, *op. cit.*, pp. 128, 182-183; Millis, Harry A., *Organized Labor* (1945), Vol. 3, pp. 376-377.
[20] Grebler, *op. cit.*, p. 16; Twentieth Century Fund, *op. cit.*, p. 39.
[21] Stone, *op. cit.*, p. 129.
[22] Stone, *op. cit.*, p. 128.
[23] Grebler, *op. cit.*, p. 90.
[24] Stone, *op. cit.*, p. 57; U. S. Bureau of Labor Statistics, Bull. No. 940, *Occupational Outlook Handbook* (Gov't. Print. Off., 1948), p. 177; Bureau of Labor Statistics, Bull. No. 626, Peterson, Florence, *Union Scales in Wages and Hours in the Building Trades* (Gov't. Print. Off., 1937), pp. 26-46; Bull. No. 730, same title (Gov't. Print. Off., 1942), pp. 28-66; Bull. No. 815, same title (Gov't. Print. Off., 1944), pp. 25-60.
[25] U. S. Bureau of Labor Statistics, Bull. No. 680, *Union Wages, Hours and Working Conditions in the Building Trades*, June 1, 1941 (Gov't. Print. Off., 1942), pp. 33-34.
[26] Grebler, *op. cit.*, p. 16; Bureau of Labor Statistics, Bull. No. 680, *op. cit.*, pp. 33-34.
[27] Haber, William, *Industrial Relations in the Building Industry* (1930), p. 329; U. S. Bureau of Labor Statistics, Bull. No. 694, Handbook of Labor Statistics, 1941 ed., Vol. I, pp. 329-342.

The Board assumed jurisdiction in the instant cases without making any study of the interstate characteristics of the light construction industry. As the Board in later cases began to get better acquainted with the facts of the industry, it has abandoned its theory that the industry as a whole is an interstate one which requires regulation of its small component parts, and now declines to assert jurisdiction where the labor dispute does not itself threaten interruption of a substantial inflow of materials across state lines. Cf. *Merrill Construction Co., Inc.*, 92 NLRB, No. 26; *Glazers Union*, 90 NLRB, No. 93; *Denver Building Trades Council*, 90 NLRB, No. 66; *B. W. Fellers Co.*, 88 NLRB, No. 212; *Row Construction Co.*, 88 NLRB, No. 132; *Petredis & Fryer*, 85 NLRB 241; *Walter J. Mentzer*, 82 NLRB 389. The facts respecting commerce recited in the foregoing cases fully confirm the material we have gathered here and show that the light construction industry rarely involves the inflow of any substantial materials from out of the state.

At the time of the enactment of the Labor Management Relations Act, Senator Taft stated that its provisions respecting jurisdictional strikes would not be generally applicable to the construction industry: "The construction industry ordinarily would be intrastate commerce and would not be affected by the Act." 93 Cong. Rec. A 3370.

This Court has, of course, always held that the erection of private homes was purely intrastate commerce. *Browning v. City of Waycross*, 233 U. S. 16, 22-23. See also cases cited in No. 85, Brief of Petitioners, pp. 51-54.

It is therefore respectfully submitted that the Board improperly assumed that labor disputes in the light construction industry would necessarily cause the stoppage of the flow of goods in interstate commerce. Indeed, the

facts which may be judicially noticed show that labor disputes in the light construction industry do not cause substantial interruption to the flow of goods in interstate commerce.

II.

Section 8 (b) (4) (A) of the Act does not make it an unfair labor practice for a union to induce or encourage employees to cease working on, or making deliveries to, a building project where nonunion labor is being employed by one subcontractor.

The Board, and all the courts which have construed Section 8 (b) (4) (A) of the Act, except the Court of Appeals for the Fifth Circuit,[28] have held that Section 8 (b) (4) (A) is not to be applied literally. Among the various reasons for departing from a literal reading have been the fact that such a reading would virtually repeal Section 13 of the Act and the fact that the legislative history of Section 8 (b) (4) (A) shows it was intended to have a much narrower effect than the breadth of its language might at first suggest. See the opinion of Judge Fahy in the court below in No. 393, R. 272-279, and cases there cited. We will not here argue the point that Section 8 (b) (4) (A) is not to be taken literally except to call attention to the fact that all the material here presented to support our interpretation of this section necessarily reinforces that point.

---

[28] *International Rice Milling Co.* v. *National Labor Relations Board*, 183 F. 2d 21, 26-27 (C. A. 5), certiorari granted, 340 U. S. 902.

A. Section 8 (b) (4) (A) makes an unfair labor practice only such strikes and picketing as are secondary boycotts at common law.

The committee reports and the debate in Congress on the Taft-Hartley bill make it clear that Congress intended by Section 8 (b) (4) (A) to make it an unfair labor practice for unions to engage in such secondary boycotts as are illegal at common law.

During the hearings the sponsors of the bill engaged in several discussions as to what was to be regarded at common law as primary activity and what secondary. While, so far as we have been able to discover, they did not discuss the precise situation presented by the introduction of nonunion men onto a construction project, their understanding of the terms primary and secondary was clearly that of the common law cases, which as we shall show hereinafter, regarded the instant type of activity as falling within the class of permissible primary rather than prohibited secondary. Senator Taft and Senator Donnell, without dissent from other members of the Senate Committee, repeatedly stated that the following two situations were to be regarded as primary rather than secondary: (1) picketing a grocery store to tell people not to buy or handle soap manufactured by an unfair manufacturer; (2) picketing or striking a print shop because another employer whose own printers are on strike has his type set there. At the Hearings on Bills to Amend the National Labor Relations Act, Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess., p. 63, Senator Taft as Chairman of the Committee, stated:

> As long as you take the position you should not buy soap from an A & P grocer, that is one thing; but when you say you shall do no business with the A & P grocer because they are selling soap, that seems to me to be a secondary boycott . . .

Senator Donnell: I think it would be very easy for pickeeters to carry signs which show the basis of the picketing.

At hearings, p. 1838-1839, Taft again said:

The Chairman: You cite one type of secondary boycott and you say, "Would it be fair to a strike of printers to permit their employer to have the type set elsewhere in a nonunion shop, and the type or matrix of the type then delivered to the employer, thus nullifying the strike?" * * * Where is the secondary boycott in it? That is what I want to know.

Mr. Batezel: Some union leaders consider that as a secondary boycott,

Mr. Chairman: I would not think it was * * *

* * * * * *

Mr. Chairman: Of course, in your second instance of 10 plants of the same corporation, there is no secondary boycott involved in that at all.

Mr. Batezel: Well, to my mind, that is what probably was meant by the secondary boycott in the bill.

Mr. Chairman: No. However, go ahead. I have not been able to find more than some very mild things which could easily be exempted that are in this so-called class of legitimate secondary boycotts. I keep hearing about them, but I have not found any examples where they seem to me particularly legitimate and still seem to fall within the classification of secondary boycotts injuring the third person's legitimate business.

Again at hearings, page 254:

Teller: * * * Labor unions should have a right to engage in concerted activity against those who aid employers involved in labor disputes, but third parties innocent of participation in the primary dispute should be protected from such concerted activity.

* * * * * *

> The Chairman: You make a distinction as to whether the person being boycotted is in some way assisting * * *
>
> * * * * * *
>
> The Chairman: * * * I can see why if you have one newspaper and the second newspaper undertakes to publish the paper for the first one.

See also hearings, Senate, pp. 255-256, 568.

During the debates in Congress Senator Taft stated that the sponsors of Section 8 (b) (4) (A) had no intent to ban strikes or picketing which had any direct relationship to the work of the striking employees. Senator Taft said (93 Cong. Rec. 3838):

> It is made an unfair labor practice for any union to engage in a secondary boycott * * * I think the committee all agreed that those types of strikes are in effect racketeering strikes. They are strikes which are not direct strikes to settle wages or hours or better working conditions. They are strikes which are, in effect, attempts to bring indirect pressure on third parties in some way to bring about a result which may ultimately be favorable to the one initiating the pressure, which has no direct relation to the work except perhaps with regard to the question of power.

During the debates Senator Taft further explained that it was the intent of the draftsmen of Section 8 (b) (4) (A) thereby to do no more than restore on the federal level the prevailing common law illegality of secondary boycotts (93 Cong. Rec. 3834, 4198). After reverting to the state of the federal law on secondary boycotts because of the Clayton and Norris-LaGuardia Acts, Senator Taft said (93 Cong. Rec. 4198):

> All this provision of the bill does is reverse the effect of the law as to secondary boycotts.

Senator Taft then went on to advert to the fact that his father wrote many decisions holding the secondary boycott illegal at common law (93 Cong. Rec. 4198).

The foregoing legislative history was summed up by Judge Rifkind in *Douds* v. *Metropolitan Federation of Architects*, 75 F. Supp. 672, 677 (D. C. S. D. N. Y.):

> Examination of these expositions of Congressional purpose indicates that the provision was understood to outlaw what was theretofore known as a secondary boycott. It is to the history of the secondary boycott, therefore, that attention should be directed, and it is in the light of that history that the term "doing business" should be evaluated.

To the same effect see *Mills* v. *United Association of Journeymen and Apprentices*, 83 F. Supp. 240, 244 (D. C. W. D. Mo.).

B. Striking or picketing a construction project because of the presence of nonunion employees working for one subcontractor is not a secondary boycott at common law.

It is well established that the conduct of a union in striking or picketing a building project where nonunion employees are working for one contractor does not constitute a secondary boycott at common law. *Gray* v. *Building Trades Council*, 91 Minn. 171, 97 N. W. 663, 1118, 63 LRA 753, 103 Ann. St. Rep. 477, 1 Ann. Cas. 172; *Meier* v. *Speer*, 96 Ark. 618, 132 S. W. 988, 32 LRA n. s. 792; *Cohn & Rath Electric Co.* v. *Bricklayers', Masons' & Plasterers' Local Union No. 1*, 92 Conn. 161, 101 Atl. 659, 6 ALR 887; *Kingston Trap Rock Co.* v. *International Union of Operating Engineers*, 129 N. J. Eq. 570, 19 A. 2d 661; American Jurisprudence, Vol. 31, *Labor* §§ 264-265.

While the American Law Institute in its Restatement of the Law of Torts does not use the terms "primary,"

"secondary" and "boycott" (Vol. 4, pp. 93, 101-102, 138-139), its exposition of the law on this subject shows that such activity was not regarded as a secondary boycott at common law. The following Sections of the Restatement are applicable:

> § 780. Representatives of Workers or Employees.
>
> A labor union or any person acting at the invitation of workers and on their behalf may exercise for them their privileges of concerted action.
>
> * * * * * *
>
> § 799. Inducement of Third Persons by Fair Persuasion.
>
> Employees are not liable to their employer for harm caused by inducing third persons through fair persuasion and for a proper object to refrain, during their dispute with the employer, from
>
> * * * * * *
>
> (d) being engaged on a job on which he also is engaged.
>
> * * * * * *
>
> *Comment on Clause* (d):
>
> e. *Working on the same job with employer.* Clause (d) finds its typical illustration in the building industry. Other industries have achieved a considerable degree of integration. Stages in the manufacture of a finished product which were formerly separately controlled are now under unified control; therefore, employees engaged in what were previously separate businesses are now employees of one employer in one business. But the building industry continues to use an elaborate system of subcontracting. Yet, the workers engaged on a particular building have considerable interest in common and their employers similarly have a community of interest. Whether they are bricklayers, carpenters, hod carriers or electricians, the workers commonly work side by side and, so far

as employers oppose them, they are frequently associated together or, at any rate, are united in their interests. Clause (d) is not restricted, however, to the building trades.

* * * * * *

§ 805. Refusal to Work on Job in Aid of Dispute With Another Employer on Same Job.

Employees who in concert refuse to work on a job on which is engaged also a third person whose employees are not members of a labor union satisfactory to the actors or are engaged in a labor dispute with him for a proper object are not liable to their employer or to the third person for harm caused thereby.

Comment:

a. The rule stated in this Section rests on the general principle underlying the rules stated in §§ 802 and 803 and the reasons discussed in § 799, Comment e. Typical illustrations included in this Section are found in the building industry.

Illustrations:

1. A operates a department store and employs clerks therein. He licenses B to operate the men's clothing department. The salesmen employed by B are not union members and are on strike for higher wages. Because of this A's clerks strike. They are not liable to either A or B.

2. A, an employer of carpenters, and B, an employer of plasterers, are engaged in work on the same building. The plasterers are on strike for higher wages. Because of this, the carpenters refuse to work on the building. They are not liable to either A or B.

A reading of the cases reveals a recognition by the courts that the peculiarities of the building trades has

divided among numerous employers what in most industries would be done by one employer. The courts have accordingly understood that if labor in the building industry is to have the protection for concerted activity deemed essential for other labor, the fortuities of legal employment relationships must be ignored. This aspect of the building trades was adverted to in the comment quoted above from the Restatement of the Law of Torts, § 799. It is emphasized in studies of the building trades. See Haber, William, *Industrial Relations in the Building Industry* (Harvard, 1930), p. 329:

> The manner in which the work in the building industry is parcelled out among the contractors makes cooperation among the several crafts indispensible. A subcontractor may have only a few days' work; and if he violates an agreement or a union rule, before the union can hold a meeting and call a strike his work may be finished and his men discharged. Even if quick action is possible, the union program may be defeated by another circumstance. The work of each subcontractor is only a small portion of that to be done on the entire building. A strike by one union may not delay the work of the other trades sufficiently to be effective. Pressure must be brought to bear upon the general contractor who is responsible for the entire building. Such pressure can be brought about, not by strikes of single trades, but by tying up the entire job.

Of the federal judges before whom this question has been presented under the Taft-Hartley Act, five have held that Section 8 (b) (4) (A) was not intended by Congress to outlaw strikes or picketing of a building project because of the use of non-union labor thereon. These judges are Judges Fahy, Edgerton and Bennett Champ Clark in Court of Appeals for the District of Columbia in No. 393, Judge Charles E. Clark in the

Court of Appeals for the Second Circuit in No. 108, and Judge Duncan in *Mills* v. *United Ass'n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry*, 83 F. Supp. 240, 245 (W. D. Mo.).

It is, of course, undisputed that in each of the three cases now before this Court the strike and picketing was caused by the presence of nonunion employees on the same job with union employees, No. 85, 80 NLRB, at 536, n. 11; No. 108, 82 NLRB, at 1029, n. 6; No. 393, 82 NLRB, at 1196-1197, 1209-1211.

To construe Section 8 (b) (4) (A) as rendering illegal the stikes and picketing in these cases would turn the law back a full half century. We do not believe that Congress either intended to or did make it unlawful for a union to induce or encourage employees to strike or engage in a concerted refusal to work with the nonunion employees, in order to protect its members from the destructive influences of nonunion men working on the same job with them.

III.

Section 8 (c) precludes the board from finding as an unfair labor practice under Section 8 (b) (4) (A), picketing which the Board finds is merely an expression of views, argument and opinion without threat.

One of the questions before this Court in No. 108 is whether the Board properly held that the picketing there involved, although the evidence showed that it constituted merely an expression of views, argument and opinion which contained no threat, nevertheless, was an unfair labor practice under Section 8 (b) (4) (A). The Trial Examiner, after carefully analyzing the evidence found as a fact that the picketing was simply and nothing more than an expression of views, argument or opinion within

the meaning of Section 8 (c) of the Act (82 NLRB, at 1050) and further found that that expression contained no threat of reprisal or promise of benefit within the meaning of Section 8 (c) of the Act (82 NLRB, at 1053). Accordingly, the Trial Examiner recommended a dismissal of the complaint (82 NLRB, at 1053-1054). The Board affirmed and adopted as its own the Trial Examiner's findings of fact in this regard (82 NLRB, at 1028-1029) but held that picketing constituted an unfair labor practice within the meaning of Section 8 (b) (4) (A), because Section 8 (c) was not to be regarded as applicable to Section 8 (b) (4) (A) of the Act (82 NLRB, at 1029). In this respect the Board, without any discussion of this point, cited and stated (82 NLRB, at 1029) that it was following its decision in *Wadsworth Building Co.*, 81 NLRB 802, the case in which the *amici curiae* were the respondents before the Board and which is pending here on petition for writ of certiorari, No. 387, this Term.

A. Section 8 (c) is applicable to section 8 (b) (4) (A).

In its decision in the *Wadsworth* case the Board expressly conceded that a literal reading of Section 8 (c) would require that it be held to limit and qualify Section 8 (b) (4) of the Act (81 NLRB, at 811). For Section 8 (c) provides that the expression of views, argument or opinion which contains no threat or promise "shall not constitute or be evidence of an unfair labor practice under *any of the provisions of this Act*" (emphasis supplied). Concededly, Section 8 (b) (4) is one "of the provisions of this Act." The Board, however, excepted Section 8 (b) (4) from the provisions of the Act which were qualified by Section 8 (c) on the ground that to qualify the words "induce" and "encourage" in Section 8 (b) (4) by the limitations of Section 8 (c) would change them into

"coerce or constrain" (81 NLRB, at 812). But this does not justify rewriting Section 8 (c). Limiting Section 8 (b) (4) does not lead to any ambiguity or absurdity. Reading a qualifying section of a statute into the other sections usually does change their meaning. This is the purpose of the qualifying section. Indeed, reading Section 8 (c) into Section 8 (a) (1) completely reads out the words "interfere" since "restrain" and "coerce" are already there and with the qualifications of Section 8 (c) the word "interfere" adds absolutely nothing. Reading Section 8 (c) into Section 8 (a) (2) changes the word "interfere" there used into "restrain or coerce."

The legislative history of Section 8 (c) likewise requires it to be held applicable to Section 8 (b) (4). There is not a single statement by the proponents of the Act during the period of its enactment that Section 8 (b) (4) was not covered by Section 8 (c). The sponsors of Section 8 (c) vigorously defended its fairness on the ground that it would apply to unfair labor practices of unions as well as unfair labor practices of employers. Senator Taft in a colloquy with Senator Ives during the course of which Senator Taft insisted that all the provisions respecting unions were paralelled by provisions respecting employers, stated (93 Cong. Rec. 4020):

> I may point out that the provision regarding free speech applies both to employer and employee.

To the same effect see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 33; S. Rep. No. 105, 80th Cong., 1st Sess., p. 23; 93 Cong. Rec. 4893, 6443, 6859.

Section 8 (b) (4) includes the major types of union unfair labor practice condemned by the Act. If Section 8 (c) does not protect employees in respect to this type of

unfair labor practice there is almost no place where Section 8 (c) would afford employees any protection.

On July 8, 1947, in a series of written questions and answers (93 Cong. Rec. A 3370) Senator Taft in response to the question whether an appeal by a union urging all working people, members of its own union, members of other unions, and members of the public generally, to refuse to buy goods from a particular employer, would violate the Act, stated, "This is not forbidden by the Act, since it is merely persuasion." In view of the fact that Section 8 (b) (4) (A) is the only boycott section of the Act, this statement by the sponsor of the Act shows that he intended Section 8 (c) to qualify Section 8 (b) (4) (A).

Since deciding the instant cases the Board has changed its mind with respect to the applicability of Section 8 (c) to Section 8 (b) (4). In *Denver Building and Construction Trades Council and Henry Shore*, 90 NLRB, No. 224, decided August 7, 1950, the Board stated that it was now satisfied that its position in the *Wadsworth* case "was not correct." In the case in which *amici curiae* are petitioners here, No. 387, the Board, in its brief in opposition to certiorari, cited its *Denver* case and conceded the applicability of Section 8 (c) to Section 8 (b) (4) (A) of the Act (Br. in Opp., No. 387, pp. 15-16). The Board, however, there took the position that its order should be sustained because Section 8 (c) afforded no protection for free speech beyond that provided by the First Amendment (Br. in Opp., No. 387, pp. 15-17, and the quotation p. 17, n.). It is the position of *amici curiae* as set forth in their reply brief in No. 387 (pp. 1-7), that: (1) the Board's findings that the picketing in question is within Section 8 (c) precludes a re-evaluation of whether the picketing in question is so protected; (2) Section 8 (c) affords a broader protection for free speech than does the First Amendment; and (3) the picketing in question is

protected by the First Amendment. Since the position of *amici curiae* in their case, No. 387, is fully applicable to No. 108, we wish to here set it forth so that whatever the position urged by the Board in No. 108, this Court will not pass on legal issues also applicable to No. 387, without having *amici curiae's* arguments before it.

B. The Board's determination that the picketing in question was merely the expression of views, argument or opinion without threat was a finding of fact which it cannot attack.

Once it is held that Section 8 (c) applies, the judgment below in No. 108 must be reversed for the Board found as a fact that all of the conduct on which its order was based constituted merely the expression of views, argument or opinion without threats (82 NLRB, 1028, 1029, 1048-1050, 1053). The two main issues litigated at the hearing in No. 108 were (1) whether the picketing constituted a command, signal, or order, as contended by the General Counsel, or merely the expression of views, argument, or opinion, as contended by the union (82 NLRB, at 1047-1050; and (2) whether or not the picketing contained an implied threat of union reprisal or an implied promise of union benefit, as contended by the General Counsel and denied by the union (82 NLRB, at 1050-1053). The Trial Examiner found that the evidence did not sustain the General Counsel's contention in either respect (82 NLRB, at 1048-1050, 1053). The Board affirmed (82 NLRB, at 1028-1029).

The Board cannot attack its own findings of fact. Nor can this Court sustain the Board's order on any theory other than that upon which the Board based its order. *Securities and Exchange Commission* v. *Chenery Corp.*, 316 U. S. 80, 87-95; *Eastern-Central Motor Carriers Assn.* v. *United States*, 321 U. S. 194; *City of Yonkers* v. *United*

States, 320 U. S. 685, 691-692; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-489.

C. Section 8 (c) affords a broader protection for free speech than that provided by the first amendment to the Constitution of the United States.

We believe that the factual character of the Board's determination that all of the union's conduct in No. 108, was protected by Section 8 (c) will make it unnecessary for this Court to consider the scope of Section 8 (c). However, the Board in No. 387, has suggested such an approach, arguing that Section 8 (c) is identical in scope with the First Amendment (Br. in Opp., pp. 15-17). In the case of *Denver Building and Construction Trades Council and Henry Shore*, 90 NLRB, No. 224, the Board stated "there is nothing in the Act or in its legislative history to indicate that Congress intended to go beyond the protective scope of the Constitution." We believe that both the Act itself and its legislative history do indicate Congress intended to grant broader protection for free speech than the First Amendment. If this Court should consider the scope of Section 8 (c), we urge it to hold that this statutory protection for free speech goes further than the Constitution in several respects here relevant.

Section 8 (c) provides that the expression of views, argument, or opinion unaccompanied by threats or promises "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act." If Congress intended this section to be read literally it is apparent that this section confers numerous immunities not granted by the First Amendment as interpreted by this Court. The use of noncoercive communication as evidence in both civil and criminal cases has never been

held barred by the First Amendment. Cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479. But limitations of noncoercive communications as to geographic locale, economic locale and justifiable objective have been deemed consistent with the First Amendment. The drafters of Section 8 (c) ignored the contours of the First Amendment as spelled out in *Carpenters Union* v. *Ritter*, 315 U. S. 722, and *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490. They wrote no such qualifications or restrictions into Section 8 (c).

The legislative history of Section 8 (c) forecloses any possible contention that Section 8 (c) was intended to afford no greater protection to communication than the First Amendment. Dissatisfaction with the scope of protection given communication under court, as well as Board, interpretation of the First Amendment was the expressed reason for the insertion of Section 8 (c) in the Act.

The Board had originally held that any anti-union statements by an employer to his employees were necessarily coercive because of the power which the employer held over his employees' jobs. This position of the Board was sustained by the courts in *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954 (C. A. 2). There Judge Learned Hand said (at p. 957):

> The privilege of "free speech," like other privileges, is not absolute * * * Language may serve to enlighten a hearer, though it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded, if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and *pro tanto* the privilege of "free speech" protects them; but, so far as they disclose his wishes, as they generally do, they have a force independent of persuasion.

> The Board is vested with the power to measure these two factors against each other, a power which does not trench upon the First Amendment. * * * What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart.

During the hearings of the Special Committee to Investigate the National Labor Relations Board appointed by the Seventy-Sixth Congress, witness after witness condemned this Board policy. The Intermediate Report issued by this Committee,[29] as well as its Final Report,[30] vigorously criticized the Board's policy of holding employer anti-union statements, unaccompanied by threats, to constitute unfair labor practices. They recommended that Section 8 (1) of the Act be amended as follows to correct this practice:[31]

> But nothing in this section or this act shall be construed or interpreted to prohibit any expression of opinion with respect to any matter which may be of interest to employees, or the general public, provided that such expressions of opinion are not accompanied by acts of coercion, intimidation, discrimination or threats thereof.

At the opening of the hearings in the Eightieth Congress which led to the adoption of the Taft-Hartley Act, Congressman Howard W. Smith, who had been chairman of the Special Committee in the Seventy-Sixth Congress, summarized the evidence gathered by his Committee and its recommendations with respect to free speech.[32] Other

[29] H. Rep. No. 1902, 76th Cong., 3d Sess., pp. 83, 90-91.
[30] H. Rep. No. 3109, 76th Cong., 3d Sess., pp. 82-83, 90-91.
[31] H. Rep. No. 1902, 76th Cong., 3d Sess., pp. 91, 104-105; H. Rep. No. 3109, p. 159; H. R. 9195, 76th Cong., 3d Sess., Sec. 7.
[32] Hearings, House Committee on Education and Labor, 80th Cong., 1st Sess., on H. R. 8, p. 80.

witnesses before the committees of the Eightieth Congress pointed out that while the Board had to some extent receded from its original position of preventing any anti-union statements by employers, legislation was still needed both to further limit the Board and to be certain it never resumed its original position.[33] The reports issued by the House and Senate Committees expressed the view that an amendment of the Act was essential to prevent the Board and the courts from unduly limiting free speech.[34]

There was considerable diversity of opinion among the members of the Senate as to how congressional rectification of undue limitations on free speech should be achieved. Senator McClellan proposed an amendment providing that in the application of the Act administrators and courts should not infringe upon "freedom of speech as guaranteed by the First Amendment to the Constitution of the United States." That this amendment would be ineffective to accomplish the congressional purpose was made clear by Senator Ferguson, who stated (93 Cong. Rec., 4893):

> I was wondering how this amendment would change the law. The highest law of the land, namely, the Constitution, is being cited in this amendment. If the same court is to construe this law which has been construing the Constitution, how can any change be effective?

The formulation proposed by Senator McClellan was thus rejected and a formulation adopted which Congress intended the courts should apply without the limitations and mutations which have been read into the First

[33] Hearings, House Committee on Education and Labor, 80th Cong., 1st Sess., pp. 25-28, 2722-2723.

[34] S. Rep. No. 105, 80th Cong., 1st Sess., pp. 23-24; H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 33.

Amendment."[35] Thus the whole purpose of Congress in writing Section 8 (c) would be defeated should the courts start narrowing it to coincide with the First Amendment.

In its decision in *Denver Building and Construction Trades Council and Henry Shore*, 90 NLRB, No. 224, the Board defined the scope of Section 8 (c) by reference to several decisions of this Court fixing the scope of the First Amendment as applied to picketing. These cases bring out clearly the differences between Section 8 (c) and the First Amendment. The first of these is *Giboney* v. *Empire Storage Co.*, 336 U. S. 490 (Br. in Opp., pp. 15-17). In that case this Court relied heavily upon the fact that under the union constitution any member crossing a picket line could be fined or suspended (at pp. 493, 498, 500, n. 6, 504). This Court, therefore, found that the picket line constituted a threat that any union member crossing the picket line would lose his union membership (at p. 498). This Court's opinion was based upon the theory stated in a concurring opinion in *Thomas* v. *Collins*, 323 U. S. 516, 537-538, which this Court quoted with approval in the *Giboney* case (at p. 503, n. 6): "But once [a speaker] uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee." As we have already demonstrated, Section 8 (c) was passed because of Con-

[35] Various statements found in the legislative history to the effect that Section 8 (c) merely preserved the constitutional right of free speech were made with respect to the Senate version, which was in this respect much less restrictive than the version of Section 8 (c) finally adopted. The Senate version permitted a finding of threat or promise when the communication was considered "under all the circumstances" (H. R. 3020, 80th Cong., 1st Sess., as passed Senate). This language was stricken because it was believed that the Board and the courts had in the past rendered hazardous speech, innocuous in itself, by creating an ever present danger that later events might give it meanings not present on its face (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; 93 Cong. Rec. 6443-6444, 6859).

gressional disapproval of the Board's reliance upon the employer's control over jobs as the basis for finding employer anti-union speeches illegal. Congress clearly intended that mere existence of power over jobs, whether in the union or the employer, without any threat to exercise that power, should not render speech unfair.

Because of Section 8 (c), one of the chief issues litigated in No. 108, was whether the picketing implied any threat of union discipline (82 NLRB, at 1050-1053). The Trial Examiner found that under the circumstances shown by the record it did not (82 NLRB, at 1053). The Board affirmed (82 NLRB, 1028-1029).[26] To the extent that *Giboney* rested on a theory of threat arising from picketing, Section 8 (c) makes it inapplicable here. To the extent that *Giboney* rested on a finding of threat, the contrary finding in No. 108 makes *Giboney* inapplicable. The same distinction applies to *Hughes* v. *Superior Court*, 339 U. S. 460; *International Brotherhood of Teamsters* v. *Hanke*, 339 U. S. 470; *Building Service Employees* v. *Gazzam*, 339 U. S. 532. These cases involved picketing which in addition to being communicative was also coercive. In the *Gazzam* case the decision of the Supreme Court of Washington had been based on the fact that the picketing therein had lost its protection since it had stepped "over the line from persuasion to coercion." 339 U. S., at 536, n. 2. In the *Hughes* case this Court upheld the right of a state to enjoin picketing "because of the compulsive features" there present which placed the picketing "beyond the aspect of mere communication as

[26] Even if the Board had found such a threat, we have serious doubts whether a threat of union discipline is the kind of a threat which is meant by Section 8 (c). Cf. the American Restatement of the Law of Torts, §798. The power of a union to discipline does not today involve any power over jobs since Sections 8 (a) (3) and 8 (b) (2) of the Act abolish the closed shop and protect employees from losing their jobs if denied membership in or expelled from membership in a union for any reason other than the failure to pay dues and initiation fees.

an appeal to reason." 339 U. S., at 468. And in the *Hanke* case, this Court, observing that "because of the interference by the pickets with the use of one of Cline's driveways, he was forced to close it" (339 U. S., at 473), concluded that the "ingredient of communication" present in picketing (at 474) did not save it from state restrictions "leaving all other channels of communication open to the union" (at 477). If the finding of coercion in these cases rested on a theory, Section 8 (c) precludes the use of such a theory here. If it rested on a finding of fact, the contrary finding in No. 108 makes the cases inapplicable. It is thus clear that irrespective of their constitutional status, the union's acts in No. 108 were protected by Section 8 (c).

D. The picketing in question was constitutionally protected.

We believe that the finding that the picketing in No. 108 was merely the expression of views, argument or opinion without threat, brings the case within the principles of *Bakery Drivers* v. *Wohl*, 315 U. S. 767; *Cafeteria Employees* v. *Angelos*, 320 U. S. 293; *American Federation* v. *Swing*, 312 U. S. 321; *Thornhill* v. *Alabama*, 310 U. S. 88. All of the subsequent cases holding picketing unprotected rested upon a determination that the picketing there present was coercive. Nothing in any of those opinions suggests that picketing which constitutes the noncoercive expression of views, argument or opinion is beyond the protection of the First Amendment.

Conclusion.

For the foregoing reasons we submit that this Court should hold that the unfair labor practices found in these cases do not affect commerce within the meaning of Sections 2 (6) and (7) of the Act, that a union does not violate Section 8 (b) (4) (A) by inducing or encouraging employees not to work on the same job with nonunion employees and that picketing which constitutes a noncoercive expression of views does not violate the Act.

Respectfully submitted,

CLIF LANGSDALE,
JOHN J. MANNING,
Attorneys for Amici Curiae.

February, 1950.